85-1071

No. 85-

Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CAROLE A. RAYBURN

Petitioner,

v.

GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM E. NELSON
SHERLEE S. NELSON
Nelson & Nelson
1825 Jefferson Place, NW
Washington, DC 20036
(202) 659-0815

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Are the equal employment provisions contained in Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e et seq.), when applied to a position in a religious organization of a "spiritual" nature, unconstitutional as an interference with the organization's free exercise of its religion?

2. Is there such a compelling interest in the elimination of sex and race discrimination in employment as to justify examination of the doctrinal basis of a religious organization's claim of interference with the free exercise of its religion?

3. Is a religious organization which practices sexual and racial discrimination in violation of the Civil Rights Act of 1964, as amended, protected by

the free exercise clause from a claim under the Civil Rights Act where the discriminatory acts are not based on any theological doctrine, and are even contrary to the professed beliefs of the organization?

THE PARTIES

Parties to the proceeding below, pursuant to Rule 21.1(b) of the Rules of this Court, were the appellant, Carole A. Rayburn; and the appellees, General Conference of Seventh-Day Adventists, Potomac Conference of Seventh-Day Adventists, Kenneth J. Mittleider, and James Londis. Neither the United States nor an officer or agency of the United States has been a party to this suit.

TABLE OF CONTENTS

	Page
Questions Presented	i
The Parties	ii
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Petition ..	13
The Plain Language of the Act and the Legislative History Establish Congress' Intent to Apply the Civil Rights Act to Religious Organizations	15
Tha Decision Below Involves a Frequently Recurring Issue, Is in Conflict with Decisions of Other Courts, and Can Only Be Resolved by This Court	19
Where a Religious Organization Has No Doctrinal Basis for Discrimination, There Is No Conflict with Its Free Exercise Rights	22
The Decision Below Was Wrongly Decided	24
Conclusion	31

TABLE OF AUTHORITIES

Page

Cases

Bunn v. North Carolina, 336 U.S. 942 (1949) 26

Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission, Inc., 766 F.2d 932 (6th Cir. 1985), review granted, 54 L.W. 3323 (Nov. 12, 1985) 21

Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980) 21

E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. den., 453 U.S. 912 (1981) 20

E.E.O.C. v. Pacific Press Pub. Ass'n, 676 F.2d 1272 (9th Cir. 1982) 16, 21, 22

E.E.O.C. v. Southwestern Baptist Seminary, 651 F.2d 277 (5th Cir. 1981), cert. den., 436 U.S. 905 (1982) 19

Gillette v. United States, 401 U.S. 437 26

Harris v. McRae, 448 U.S. 297 (1980) 23, 26

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 29

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 26

Jones v. City of Opelika, 316 U.S. 584 (1942), vacated 319 U.S. 103 (1943) 27

Bob Jones University v. United States, 103 S.Ct. 2017 (1983) 19, 25

Lemon v. Kurtzman, 403 U.S. 602 (1971) 28

McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), cert. den., 409 U.S. 896 (1972) 19

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 54 L.W. 3323 (Nov. 12, 1985) 14

Prince v. Massachusetts, 321 U.S. 158 (1944) 26

Reynolds v. United States, 98 U.S. 145 (1878) 26

Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984) 29

Thomas v. Review Bd. of the Indiana Employment Security Division, 450 U.S. 707 1981).. 22, 29

United States v. Gainey, 380 U.S. 63 (1965) 13

United States v. Lee, 455 U.S. 252 (1982) 25

Whitney v. Greater New York Corps of Seventh Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975) 21

Wiggins v. Sargent, 753 F.2d 663, (8th Cir. 1985) 23

Wisconsin v. Yoder, 406 U.S. 205 (1972) 22, 24

Constitution and Statute

First Amendment to the Constitution of the United States ..... passim

42 U.S.C. § 2000e, 3-1, 3-2 ..... passim

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CAROLE A. RAYBURN

Petitioner,

v.

GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Carole A. Rayburn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 772 F.2d 1164, and is

reproduced in Appendix A at pages 1-A to 36-A. The opinion of the District Court is unreported and is reproduced in Appendix B at pages 37-A to 58-A.

JURISDICTION

The judgment of the Court of Appeals was entered on September 23, 1985. A copy of the judgment of the Court of Appeals is reproduced in Appendix D at pages 63-A to 64-A. The jurisdiction of this Court is invoked pursuant to 28 U.S. Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the free exercise clause of the first amendment to the Constitution of the United States and the equal employment provisions of the Civil Rights Act of 1964, as amended.

The first amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title VII of the Civil Rights Act in pertinent part states:

> § 2000e-1. Exemption
> This title [42 USCS §§ 2000e et seq.] shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.
>
> § 2000e-2. Discrimination because of race, color, religion, sex, or national origin
> (a) Employers. It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions,

> or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The provisions of 42 U.S.C. 2000e are set forth in context in Appendix E, pages 65-A to 84-A.

STATEMENT OF THE CASE

Petitioner, Carole A. Rayburn, is a member of the Seventh-Day Adventist Church, has a Ph.D. in psychology, and is a magna cum laude graduate of the Seventh-Day Adventist theological seminary, Andrews University.

Defendant General Conference of Seventh-Day Adventists is the overall

governing and administrative body of the Seventh-Day Adventist Church. Defendant Potomac Conference of Seventh-Day Adventists (sometimes referred to as the local conference, to distinguish it from the General Conference) is a subordinate body, with administrative responsibility over a geographic region which includes part of the State of Maryland; one of the local churches within the Potomac Conference is the Sligo Church in Takoma Park, Maryland. Defendant Kenneth J. Mittleider was President of the Potomac Conference for a period of time ending in May 1980, and is now one of five world-wide vice presidents of the church. Defendant James Londis is and at all relevant times was Pastor of the Sligo Church.[1]

---

[1] Two other entities were originally named as defendants in this action, the General Conference Corporation of

Petitioner had been a practicing clinical psychologist but decided in 1977 to make a career change and went to Andrews University, a Seventh-Day Adventist divinity school. The Seventh-Day Adventist church does not ordain women, and petitioner has not and does not challenge that position.

In the fall of 1979, as she was approaching graduation, petitioner applied for a position as an Associate in Pastoral Care internship within the Potomac Conference. She directed her application to defendant Kenneth Mittleider and Dan Matthews, the President and Secretary, respectively, of the Potomac Conference. At approximately the same time, she also applied for a vacancy on the pastoral

---

[1] (continued)
Seventh-day Adventists and the Potomac Conference Corporation of Seventh-day Adventists. Both were dismissed by consent of the parties.

staff of the Sligo Church, directing her application to defendant Londis. The outgoing incumbent of the position in the Sligo Church was an Associate in Pastoral Care.

The Associate in Pastoral Care position was created by the Seventh-Day Adventist Church for women who are in training or who have completed training for the ministry but are not eligible for ordination. (Affidavit of Herbert H. Broeckel in support of defendants' motion for summary judgment, par. 3).

Plaintiff was not offered an Associate in Pastoral Care internship, and during the many months she tried to pursue her application and sought information regarding its status, a number of internship positions were filled. Among those selected were Janice Daffern, who filled the Sligo Church position, and

William Neely and Jon McGraw, who were assigned elsewhere in the Potomac Conference.[2]

Petitioner is a white woman who has been active in black causes and while attending Andrews University divinity school was a member of and an officer in the Black Forum, an organization primarily of black students.

Subsequently, petitioner learned that she had been rejected for the

---

[2] Since, as males, Neely and McGraw were eligible for ordination at some future time, they were not called Associate in Pastoral Care interns but, rather, ministerial interns. Neither was an ordained minister, however, and McGraw had never attended seminary at all; nor were they assigned any duties which plaintiff would have been barred from performing or unqualified to perform. The Seventh-Day Adventists stress lay participation, and Carole Rayburn has performed all the duties as a lay participant which she would be called on to perform in the positions in question. (Rayburn affidavit in opposition to defendants' motion for summary judgment, par. 5)

positions, without her knowledge, in an exchange of memorandums between Dan Matthews and Defendant Mittleider. On October 23, 1979, Matthews, after noting petitioner's impressive credentials and recommendations, stated, "Are there any possibilities here or should we be telling her 'nix' again right from the top?" (App. F, p. 86-A)[3]

On October 30, 1979, Defendant Mittleider replied to Matthews in which he stated, in pertinent part, "I wonder if the fellows who are making the recommendations really know her. She is a crusader. You will notice one of the activities she joined in at Andrews is the Black Forum. She will constantly be working [for] 'the underprivileged',

---

[3] The basis for the word "again" is unexplained in the record and is unknown to petitioner. (See Mittleider dep., pp. 133-135.)

trying to better their situation from a material standpoint." (App. G, p. 87-A)

After she was finally notified that her application was rejected, petitioner exhausted her administrative remedies and then filed the instant case in which she alleges that she was denied employment because of her race and sex[4] in violation of Title VII of the Civil Rights Act of 1964, as amended. Jurisdiction in the United States District Court was based upon 28 U.S.C. 1343(4) and 42 U.S.C. 2000e-5(f)(3).

Defendants filed motions to dismiss the complaint on a number of grounds. Because these motions relied on matters

---

[4] Defendant Londis admitted in his deposition that petitioner was not considered for a subsequent vacancy on the pastoral staff at Sligo Church because the Potomac Conference leadership believed it was injudicious to have more than one woman on the pastoral staff at the same time. (Dep. p. 144; see also Mittleider deposition, p. 266.)

outside the complaint, they were treated as motions for summary judgment, and limited discovery was permitted, followed by briefing and argument. On February 15, 1984, the District Court entered summary judgment for the defendants on two grounds: (1) that the General Conference was insufficiently involved in the rejection of plaintiff's application to be subject to suit, and (2) that a Title VII suit with respect to the positions plaintiff was denied was barred by the religion clauses of the First Amendment.

On September 23, 1985, the Court of Appeals affirmed the grant of summary judgment to defendants, and held that applying the equal employment sections of Title VII to spiritual positions of the church exceeded Congress' constitutional authority and interfered with the church's free exercise of religion.

The Seventh-Day Adventist Church has a very substantial black membership. The Church refused to permit racially segregated churches in the South or separate segregated unions (Rayburn affidavit number 2 of November 23, 1981, par. 4), and has never contended that Church theology supports discrimination on the basis of race.[5]

---

[5] The proportion of blacks in the Church membership does not appear of record. The Mittleider memorandum has been a source of embarrassment to the Church and an affront to its black members since the contents of the memorandum became known. Recently, in response to picketing by black members, Mr. Mittleider issued a public apology. Washington Post, Oct. 14, 1985, p. C2; Washington Afro-American, Oct. 19, 1985, p. 1. The Washington Post article states that the Church's membership in North America is nearly one-fourth black, and the Afro-American article states the Church has 1,000,000 black members in Africa. The total membership was found to be 4,000,000 at the time of the District Court opinion (App. D, p. 39-A).

REASONS FOR GRANTING THE PETITION

This case involves a decision by the Court of Appeals in which it exercised the "grave power of annulling an Act of Congress." United States v. Gainey, 380 U.S. 63, 65 (1965). The decision below will leave an enforcement void in one of the most important statutes implementing current public policy, the Civil Rights Act of 1964, as amended.

The decision below conflicts with decisions of other Circuits and United States District Courts. It involves the frequently recurring problem of reconciling the "free exercise" clause of the first amendment with Title VII of the Civil Rights Act, which this Court has not considered.

The Court of Appeals' decision allows the free exercise claim to prevail over a basic Act of Congress even though

no basis in theological doctrine is advanced in support of the free exercise claim.

If the United States or an officer, agency, or employee had been a party to this suit, as mandated by 28 U.S.C. 2403, petitioner would have had an appeal to this Court as of right pursuant to 28 U.S.C. 1252, illustrating the importance which Congress attaches to such a constitutional decision, irrespective of the overriding public importance of the issue here. The provisions of 28 U.S.C. 2403(a) may be applicable, and copies of this petition are being served on the Solicitor General pursuant to Rule 28 of the Rules of this Court.

In addition, there is presently pending before this Court a case involving a related subject matter, Ohio Civil Rights Commission v. Dayton Christian

Schools, Inc., 54 L.W. 3323 (Nov. 12, 1985), in which this Court recently granted review; the decision of the court below has much broader impact, both geographically and philosophically.

THE PLAIN LANGUAGE OF THE ACT AND THE LEGISLATIVE HISTORY ESTABLISH CONGRESS' INTENT TO APPLY THE CIVIL RIGHTS ACT TO RELIGIOUS ORGANIZATIONS

The only exemption for religious institutions from the application of Title VII of the Civil Rights Act of 1964 is the provision in Section 702 (42 U.S.C. § 2000e-1). The exemption states:

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. [emphasis supplied]

As was recognized by the Fourth Circuit in this case, and by all other

courts which have examined the issue, the exemption is a narrow one, only allowing discrimination based on religious grounds. E.E.O.C. v. Pacific Press Pub. Ass'n, 676 F.2d 1272 (9th Cir. 1982).

The original version of the 1964 Civil Rights Act, H. R. 7152, contained a broad exemption entirely excluding religious employers from coverage under the Act.

A substitute bill proposed by Senators Humphrey, Dirksen, and Mansfield adopted a more limited exemption, making Title VII applicable to religious employers, but permitting them to employ individuals of a particular religion to perform work connected with its religious activities. See "Congressional Debate on Titles VII and XI Introduction," in 1964 Legis. Hist. at 3001, 3004, 3050; 110 Cong. Rec. 12812. The Senate rejected a

total exemption for religious organizations proposed in a later substitute bill. 110 Cong. Rec. 12864.

After debate on the various proposals, the Senate passed the Dirksen-Mansfield substitute. See 1964 Legis. Hist. at 11. The House accepted the substitute without amendment.

During debate on the 1972 Amendments, Senators Ervin and Allen proposed that the employment practices of all religious institutions be removed completely from E.E.O.C. jurisdiction. See Legislative History of Title VII of the Equal Employment Opportunity Act of 1972 at 1229-1230 ("1972 Legis. Hist."), 118 Cong. Rec. 1982. Again the Senate rejected the blanket exemption.

The Senate accepted a subsequent proposal by Senator Ervin that broadened the scope of the exemption only slightly

to allow religious employers to discriminate on the basis of religion with respect to all -- not just religious activities. 1972 Legis. Hist. at 789; 118 Cong. Rec. 7170.

The legislative history shows that Congress consistently rejected proposals to allow religious employers to discriminate on grounds other than religion: "[church-affiliated] organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin." [emphasis supplied] Section-by-Section Analysis of H. R. 1746, The Equal Employment Opportunity Act of 1972, 1972 Legis. Hist. 1845; 118 Cong. Rec. 7167.

Thus, it was the intention of Congress, clearly expressed, to apply Title VII to religious organizations.

See Bob Jones University v. United States, 103 S.Ct. 2017, 2034 (1983).

THE DECISION BELOW INVOLVES A FREQUENTLY RECURRING ISSUE, IS IN CONFLICT WITH DECISIONS OF OTHER COURTS, AND CAN ONLY BE RESOLVED BY THIS COURT

There have been a number of cases which have arisen around the country since the Civil Rights Act became law involving a clash between the free exercise clause and Title VII. Some, particularly a series of Fifth Circuit cases commencing with McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), cert. den., 409 U.S. 896 (1972), have concluded that Congress could not, consistent with the free exercise clause, include "ministerial" positions within the coverage of the Act, and implied a "ministerial" exception to the Act to save its constitutionality. See E.E.O.C. v. Southwestern Baptist Seminary, 651

F.2d 277 (5th Cir. 1981), cert. den., 436 U.S. 905 (1982); E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. den., 453 U.S. 912 (1981). The lines as to what was considered a "ministerial" position have not been cleanly delineated, primarily but not exclusively stressing ordination in determining what positions are impliedly exempt from the Act's coverage.

The court below adopted a different test, holding that anything involving a church's "spiritual" functions was beyond scrutiny, made no attempt to find any implied exception to the Act, and held the Act to be beyond the constitutional power of the civil authorities. App. A, pp. 14-A to 36-A.

Other cases have upheld the application of Title VII in varying circumstances. Of particular interest to this

present case is E.E.O.C. v. Pacific Press Pub. Ass'n, supra, upholding application of Title VII to an editorial secretary employed by a Seventh Day Adventist publishing house, where the Ninth Circuit specially noted that the church proclaims it does not discriminate against women or minorities (p. 1279). See also, Whitney v. Greater New York Corps of Seventh Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975) (white clerk-typist discharged for associating with black man violated Act); Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980) (single woman discharged for pregnancy, violated Act). Cf., Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission, Inc., 766 F.2d 932 (6th Cir. 1985), review granted, 54 L.W. 3323 (Nov. 12, 1985) (Ohio Civil Rights Act unconstitutional as applied to teacher in religious school).

WHERE A RELIGIOUS ORGANIZATION HAS NO DOCTRINAL BASIS FOR DISCRIMINATION, THERE IS NO CONFLICT WITH ITS FREE EXERCISE RIGHTS

The defendants have not contended and do not contend that their discriminatory acts are founded upon doctrinal belief, and in fact they proclaim the contrary, that they do not discriminate, see E.E.O.C. v. Pacific Press Pub. Ass'n, supra, except that women cannot be ordained, which is not an issue raised by petitioner.

In these circumstances, the courts below should not even have reached the constitutional issues. Only sincerely held beliefs which are rooted in religion are protected by the free excercise clause. Thomas v. Review Bd. of the Indiana Employment Security Division, 450 U.S. 707, 713 (1981); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972);

Wiggins v. Sargent, 753 F.2d 663, 666 (8th Cir. 1985).

The court below held it could not inquire whether petitioner's "rejection had some explicit grounding in theological belief." (App. A, p. 22-A) If it had, the defense would not have survived. In these circumstances defendants do not have a justiciable issue, and the court is giving an advisory opinion unrelated to any inhibitions on the church's free exercise of its religion. This is the same principle as this Court recently applied to plaintiffs who lacked standing to raise the constitutionality of a statute when not directly affected by its application. Harris v. McRae, 448 U.S. 297 (1980) (plaintiffs had no standing to challenge Hyde Amendment under free exercise clause where none personally injured by act).

If there is a conflict between the statute and the free exercise of religion, the court is compelled to balance the competing interests, Wisconsin v. Yoder, supra, but first there must be a conflict. If no such doctrinal basis is required, the free exercise clause can become an open-ended defense against laws the organization finds distasteful.

THE DECISION BELOW WAS WRONGLY DECIDED

We respectfully suggest that even if the court below did properly reach the constitutional issue, the issue was wrongly decided. Petitioner's claims were rejected on summary judgment, so that the factual record in her favor must be accepted. The record clearly established that she was rejected under circumstances involving clear violations of the law on the basis of race and sex.

This Court has specifically held that discrimination on the basis of racial associations is a form of racial discrimination. Bob Jones University v. United States, supra, and the cases there cited. Similarly, where the record clearly shows that petitioner was rejected for a second job because the church already had one woman employed and did not wish to employ two at the same time, the actions would constitute blatant sex discrimination if not protected by the free exercise clause.

This Court has seldom, if ever, upheld a free exercise claim in conflict with a Congressional enactment. See, e.g., Bob Jones University v. United States, supra (implied approval by Congress of revocation of tax exemption); United States v. Lee, 455 U.S. 252 (1982) (requirement of participation in Social

Security system over objection that it violated Amish theology); Harris v. McRae, supra; Gillette v. United States, 401 U.S. 437, 462 (individual's conscientious objection to Viet Nam war); Reynolds v. United States, 98 U.S. 145 (1878) (polygamy not permissible though basic theological doctrine of church). See also Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (solicitation for religious activities confined to booths at fair); Prince v. Massachusetts, 321 U.S. 158 (1944) (enforcement of State child labor laws over church's theological objection); Bunn v. North Carolina, 336 U.S. 942 (1949) (affirmed dismissal for want of federal question where State law forbade handling of poisonous snakes, as demonstration of faith).

The distinction between the absolute

freedom of religious belief as opposed to the limits on actions taken in response to those beliefs was once expressed by this Court in this way (Jones v. City of Opelika), 316 U.S. 584, 593-4 (1942), vacated 319 U.S. 103 (1943):

> Courts, no more than Constitutions, can intrude into the consciences of men or compel them to believe contrary to their faith or think contrary to their convictions, but courts are competent to adjudge the acts men do under color of a constitutional right, such as that of freedom of speech or of the press or the free exercise of religion and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind. So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows.

Here Congress refused to grant to religious organizations any blanket exemptions from the application of Title VII of the Civil Rights Act, with the single exception that such an organization can grant preference on the basis of religious

belief. It is also clear from the legislative history that the denial of such exemption was not accidental but involved direct votes on at least two occasions eight years apart.

The Fourth Circuit commenced its analysis from the standpoint of the "wall of separation" between church and state, which is a first amendment "establishment" concept and misleads analysis in a free exercise case. Similarly, the "entanglement" concept from Lemon v. Kurtzman, 403 U.S. 602 (1971), is essentially an establishment concept, although ongoing interference with a church's operations obviously does raise free exercise problems. As has been noted recently, there is underlying tension between the establishment and free exercise clauses, and any advantages accruing to one church under the free

exercise clause, and not available to another church or organization or individual, can by itself raise establishment problems. See Thomas v. Review Board, supra (majority and dissenting opinions).

This Court has noted, and Congress was well aware of, the stigma and deprivation of personal dignity that accompanies discrimination on the basis of race or sex. Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964); Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984). It is important from a policy standpoint that an individual who has both the conviction and courage to oppose such practices not be forced needlessly to suffer harm as a consequence.

Almost all members of Congress also belong to some religious organizations and all are well aware of the application

of the first amendment to religious organizations, and the fundamental importance of freedom of religion in our constitutional scheme. Congress obviously believed that religious organizations were too important in setting models for conduct and in the dissemination of moral and ethical values to the public to free the religious organizations of any obligations not required by church doctrines. This does not mean that by applying a "ministerial" exception, the court is conflicting with Congressional intent, but if the Congress had wanted to draw such a line applicable to all, it could have readily done so. That it did not accept such an obvious solution indicates that Congress wanted the antidiscrimination laws to apply to the religious organization until a conflict arose, and if none arose, the laws applied fully.

The names attached to the amendment rejecting exemption of religious organizations from the application of Title VII included men prominent in the legislative movement for civil rights.

In rejecting the line Congress drew, and denying the application of the anti-discrimination laws where no doctrinal basis of the church conflicts with the law, we respectfully suggest the court below erred.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM E. NELSON
SHERLEE S. NELSON
Nelson & Nelson
1825 Jefferson Place, N. W.
Washington, D. C. 20036

Attorneys for Petitioner

No. 85-

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CAROLE A. RAYBURN

Petitioner,

v.

GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, *et al.*

Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM E. NELSON
SHERLEE S. NELSON
Nelson & Nelson
1825 Jefferson Place, NW
Washington, DC 20036
(202) 659-0815

Attorneys for Petitioner

TABLE OF CONTENTS – APPENDIX

Page

APPENDIX A
Opinion of the United States Court of Appeals for the District of Columbia Circuit ... 1-A

APPENDIX B
Opinion of the United States District Court for the District of Maryland 37-A

APPENDIX C
Order and Judgment of the United States District Court for the District of Maryland ... 59-A

APPENDIX D
Judgment of the United States Court of Appeals for the Fourth Circuit 63-A

APPENDIX E
Title VII of the Civil Rights Act of 1964, as amended:
42 U.S.C. 2000e 65-A
42 U.S.C. 2000e-1 ..... 73-A
42 U.S.C. 2000e-2 ..... 73-A

APPENDIX F
October 23, 1979, Memorandum from Daniel G. Matthews to Kenneth J. Mittleider and John Loor 85-A

APPENDIX G
October 30, 1979, Memorandum from Ken Mittleider to Dan Matthews 87-A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1319

Carole A. Rayburn,

Appellant,

versus

General Conference of Seventh-day Adventists, an unincorporated association;
General Conference Corporation of Seventh-day Adventists, a corporation;
Potomac Conference of Seventh-day Adventists, an unincorporated association;
Potomac Conference Corporation of Seventh-day Adventists, a corporation;
Kenneth J. Mittleider; and
James Londis;

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge. (C/A 81-2202).

Argued: March 4, 1985
Decided: September 23, 1985

Before WINTER, Chief Judge, and SPROUSE and WILKINSON, Circuit Judges.

Eileen M. Stein for Appellant; Walter E. Carson; Glenn E. Culpepper (Johns and Carson; Ginerich and Culpepper on brief) for Appellees.

WILKINSON, Circuit Judge:

This case raises significant questions about the application of the civil rights laws to churches. The issue is whether a woman denied a pastoral position in the Seventh-day Adventist Church may charge that church with sexual and racial discrimination under Title VII of the Civil Rights Act of 1964. The district court granted summary judgment to defendants on the grounds that the suit was barred by the religion clauses of the First Amendment. Because state scrutiny of the church's choice would infringe substantially on the church's free exercise of religion and would constitute impermissible government entanglement with church authority, we

affirm the judgment of the district court.

I

Carole Rayburn is a white female member of the Seventh-day Adventist Church who holds a Master of Divinity degree from Andrews University, the church's theological seminary, and a Ph.D. in psychology from Catholic University. In 1979 she applied to appellee Potomac Conference, an adminis trative body within the church, for an Associate in Pastoral Care internship. At about the same time, she applied for a vacancy on the pastoral staff of the Sligo Seventh-day Adventist Church, one of the denomination's largest with a congregation of five thousand people at the church's world headquarters in Takoma Park, Maryland.

Rayburn hoped by securing the

internship to be assigned to the Sligo Church vacancy. The pastoral staff of Sligo Church consists of the senior pastor and six associate pastors. The position of associate pastor may be held by an ordained minister, a ministerial intern (a male who has received seminary training but has not been ordained), or an associate in pastoral care (a female who has received seminary training but has a different title from her male counterpart because in the Seventh-day Adventist Church women may not stand for ordination).

Both the Sligo vacancy as an associate in pastoral care and the Potomac Conference internship were awarded to another woman. Upon learning of her rejection, Rayburn filed a complaint with the Equal Employment Opportunity Commission under Title VII of the Civil Rights

Act of 1964, alleging discrimination on the basis of her sex, her association with black persons, her membership in black-oriented religious organizations, and her opposition to practices made unlawful by Title VII. After receiving a right-to-sue letter, she filed the present action against the Potomac Conference and its president, Kenneth Mittleider, the pastor of the Sligo Church, James Londis, and the General Conference of Seventh-day Adventists, the governing body of the church which must formally approve all applications recommended by local bodies such as the Potomac Conference.[1]

Limited discovery focused on the

[1] The original complaint also named as defendants the General Conference Corporation of Seventh-day Adventists and the Potomac Conference Corporation of Seventh-day Adventists. Both entities were dismissed by consent of the parties prior to the district court's decision.

nature of an associateship in pastoral care. Undisputed evidence showed that the Sligo Church position entailed teaching baptismal and Bible classes, pastoring the singles group, occasional preaching at Sligo and other churches, and other evangelical, liturgical, and counselling responsibilities. An associate in pastoral care may also receive a "commissioned minister credential" or a "commissioned minister license," although, as stated, she may never be ordained.

Rayburn did submit some evidence to support her claims of sexual and racial discrimination, but the district court for the District of Maryland granted defendants' motions for summary judgment. The court ruled that the General Conference of the church should be dismissed as a defendant because it had no involvement with Rayburn's application. It held

further that a Title VII suit was barred in this instance by the religion clauses of the First Amendment. Contending that selection of an associate in pastoral care is not exempt from Title VII, Rayburn brings this appeal.

II

Before addressing the decision of the district court and the response of Rayburn, we must first determine whether Title VII and the First Amendment necessarily collide in this case. The Supreme Court has often noted that "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." International Association of Machinists v. Street, 367 U.S. 740, 749-50 (1961); accord, Curtis v. Loether, 415 U.S. 189,

192 n.6 (1974); Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Such a construction is especially appropriate when a broader reading of the statute implicates the religion clauses of the First Amendment. In NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), the Court, discussing the National Labor Relations Board's jurisdiction over lay teachers in parochial schools under the National Labor Relations Act, stated:

> In keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify "the affirmative intention of the Congress clearly expressed" before concluding that the Act grants jurisdiction.

440 U.S. at 501, quoting McCulloch v. Sociedad Nacional de Marineros de Honduros, 372 U.S. 10, 21-22 (1963) (further citation omitted).

The application of Title VII to the employment relationship before us would definitely "give rise to serious constitutional questions." See e.g. Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich, 426 U.S. 696 (1976); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); McClure v. Salvation Army, 460 F.2d 553 (5th Cir.) cert. denied, 409 U.S. 896 (1972). Although we would prefer to avoid those questions, we do not believe that such a course is fairly open to us. The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent. Section 702 of Title VII, as amended, 42 U.S.C. § 2000e-1 (1982), provides:

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to

> the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. (emphasis supplied).

The wording of § 702 may fairly be construed to prohibit some forms of state involvement in ecclesiastical decisions of employment. If, for example, a religious institution were to present "convincing evidence" that an employment practice favored members of one faith or denomination over another, "§ 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination." EEOC v. Mississippi College, 626 F.2d 477, 485 (5th Cir. 1980).

While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does

not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin, see EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1277 (9th Cir. 1982); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 282 (5th Cir. 1981); EEOC v. Mississippi College, 626 F.2d at 484; McClure v. Salvation Army, 460 F.2d at 558.[2] The statutory exemption applies to one particular reason for employment decision - that based upon religious preference. It was open to Congress to exempt from Title VII the religious employer, not simply one basis of employment, and Congress plainly did not.

[2] Here, of course, one member of the Seventh-day Adventist Church was selected over another of that same faith for reasons appellant allege pertain to race and sex.

The legislative history reinforces

the plain meaning of the statutory text. The original Act passed by the House in 1964 excluded religious employers from coverage altogether, H.R. Rep. No. 914, 88th Cong., 1st Sess. (1964), reprinted in 1964 U.S. Cong. & Admin. News, 2391, 2402. The final version excluded such employers only with respect to discrimination based on religion, and then only with respect to persons hired to carry out the employer's "religious activities." P.L. 88-352, Title VII, § 702, 78 Stat. 255 (July 2, 1964), reprinted in 1964 U.S. Cong. & Admin. News 287, 304. In 1972 the statute was amended to delete the word "religious," P.L. 92-261 § 3, 86 Stat. 103 (March 24, 1972), but Congress specifically rejected proposals to broaden further the scope of the exemption. Subcommittee on Labor of the Committee on Labor and Public Welfare

of the United States Senate, Legislative History of the Equal Employment Opportunity Act of 1972 (Comm. Print 1972), at 1229-1230, 1258-1260. To the contrary, the analysis pertaining to § 702 states clearly that "Such organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin." Section-by-Section Analysis of H.R. 1946, the Equal Employment Opportunity Act of 1972, reprinted in id. at 1844, 1845.

We cannot impose upon a statute a limiting construction where to do so would strain congressional intent. Given the wording of the statute and the history behind it, we conclude that Title VII, by "the affirmative intention of the Congress, clearly expressed," Catholic Bishop, 440 U.S. at 501, applies to the employment decision in this case. We

must turn, therefore, to the constitutional questions.

III

The "wall of separation" between church and state, Everson v. Board of Education, 330 U.S. 1, 16 (1947) has become a "variable barrier," Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), as Congress has enacted comprehensive legislation to achieve desirable goals.[3] Tensions have developed between our cardinal Constitutional principles of freedom of religion, on the one hand, and our national attempt to eradicate

[3] See D. Laycock, Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Columbia L. Rev. 1373 (1981), citing as examples the National Labor Relations Act, the Fair Labor Standards Act, the Civil Rights Act of 1964, and the Federal Unemployment Tax Act. Id. at 1373.

all forms of discrimination, on the other.[4]

Each person's right to believe as he wishes and to practice that belief according to the dictates of his conscience so long as he does not violate the personal rights of others, is fundamental to our system. Sherbert v. Verner, 374 U.S. 398, 402-403 (1963). This basic freedom is guaranteed not only to individuals but also to churches in their collective capacities, which must have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). Ecclesiastical decisions are generally

[4] See B. Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Columbia L. Rev. 1514 (1979).

inviolate; "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law," Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976). The right to choose ministers without government restriction underlies the well-being of religious community, see Kedroff, 344 U.S. at 116, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.[5]

[5] The free exercise rights of an organized church may appear, upon occasion, to infringe upon the religious liberties of individual members. We discern no such litigable conflict here, however, for the Court in Kedroff and Milivojevich has warned of the dangers of interposing government between church

Any attempt by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's free exercise rights. We next inquire whether "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); see also Sherbert v. Verner, 374 U.S. 403 (1963). It would, of course, be difficult to exaggerate the magnitude of the state's interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin. There remains, then, for examination the

[5] (continued)
and believer. No member of a church may claim, under the First Amendment, an enforceable right to be considered or accepted by the church hierarchy as a minister. The dissident or dissatisfied must, under Milivojevich, generally look elsewhere for resolution of such grievances.

decisive criterion developed by the Court in Wisconsin v. Yoder to resolve a free exercise question: a balancing of the burden on free exercise against the "impediment to . . . [the state's] objectives that would flow from recognizing the claimed . . . exemption." 406 U.S. at 205.

Here that balance weighs in favor of free exercise of religion. The role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty. The associate in pastoral care at Sligo Church is, according to undisputed evidence, pastoral advisor to the Sabbath School that introduces children to the life of the church. She also leads small congregational groups in

Bible study. As counselor and as pastor to the singles group, the associate in pastoral care is once again a liaison between the church as an institution and those whom it would touch with its message. Such counseling requires sensitivity both to the human problems of the congregation and to the church's message of comfort in the face of those problems. Never are people more in need of spiritual leadership than when they turn to a pastor for help in dealing with their most difficult moments. Finally, the selection of the associate in pastoral care to stand on the platform during services, to lead out the congregation during the church's solemn rites, and to preach occasionally from the pulpit places the imprimatur of the church upon that person as a worthy spiritual leader to whom members may look for consulta-

tion, example, and guidance in their own lives and in the life of the congregation as a corporate body.

Any one of these functions so embodies the basic purpose of the religious institution that state scrutiny of the process for filling the position would raise constitutional problems; when all functions are combined, the burden of potential interference becomes extraordinary. This burden is not diminished by the fact that lay church members may on appropriate occasions be called upon to participate in one or more of these activities or to serve in similar capacities in teaching and counseling each other. Lay ministries, even in leadership roles within a congregation, do not compare to the institutional selection for hire of one member with special theological training to lead others.

The fact that an associate in pastoral care can never be an ordained minister in her church is likewise immaterial. The "ministerial exception" to Title VII first articulated in McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972), does not depend upon ordination but upon the function of the position, EEOC v. Southwestern Baptist Seminary, 651 F.2d 277 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982). "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations. 79 Columbia

L. Rev. 1514, 1515 (1979). This approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church, see Southwestern Seminary, 651 F.2d at 283. In the instance before us, the evidence is simply overwhelming that it is.

While it is our duty to determine whether the position of associate in pastoral care is important to the spiritual mission of the Seventh-day Adventist Church, we may not then inquire whether the reason for Rayburn's rejection had some explicit grounding in theological belief. Emphasis on the role of an associate in pastoral care rather than the reasons for Rayburn's rejection underscores our constitutional concern for the unfettered right of the church to resolve certain questions. The fact that

the Seventh-day Adventist Church does not ordain women, the asserted scriptural basis for that practice, and the influence or lack thereof of this restriction in Rayburn's case do not influence our analysis. In "quintessentially religious" matters, Milivojevich, 426 U.S. at 720, the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.

The magnitude of the free exercise burden need not always obscure the magnitude of the state's interest embodied in Title VII. In Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981), the Supreme Court noted that "The state may justify an

inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest," but with the caveat from Wisconsin v. Yoder, 406 U.S. at 215, that nevertheless "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." 450 U.S. at 718. As Title VII is an interest of the highest order, courts have held that Title VII properly applied to the secular employment decisions of a religious institution, such as those relating to a secular teacher in a church-approved school, EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied, 435 U.S. 912 (1981), or editorial secretary in a church publishing house, EEOC v. Pacific Press Publishing Association, 676 F.2d 1272 (9th Cir. 1982). But courts must distinguish

incidental burdens on free exercise in the service of a compelling state interest from burdens where the "inroad on religious liberty" is too substantial to be permissible. Thomas v. Review Board, 450 U.S. at 718. This case is of the latter sort: introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state. While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs. The balance of values thus weighs against Rayburn's suggestion that the government may question the decision of the Seventh-day Adventist Church to hire another

candidate as an associate in pastoral care.

IV

To subject church employment decisions of the nature we consider today to Title VII scrutiny would also give rise to "excessive government entanglement" with religious institutions prohibited by the establishment clause of the First Amendment, Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).[6] Under Lemon, entanglement is measured by the "character and purposes" of the institution affected, the nature of the benefit or burden

[6] Lemon proposes three tests for determining the validity of a statute under the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-613 (citations omitted). There is no question that Title VII meets the first two of these tests.

imposed,[7] and the "resulting relationship between the government and the religious

[7] As the statutes under discussion in Lemon provided benefits to parochial schools, the Court stated its criteria only in positive terms, whereas here we consider a potential burden on a religious institution. We see no reason why the dangers of entanglement are diminished in the latter situation. The risk of entanglement is not limited to situations where there is state assistance or sponsorship of a religious institution. Walz v. Tax Commission of the City of New York, 397 U.S. 664, 674 (1970) (either taxation or exemption of churches would raise questions of entanglement). The dangers of entanglement are posed where there exists a continuing close administrative relationship in core areas of faith that poses the possibility of secular approval granted or withheld from religious denominations. NLRB v. Catholic Bishop of Chicago, 440 U.S. at 502. While the administrative relationship here constitutes a burden on the religion -- and hence implicates free exercise values -- we think that the First Amendment is also independently concerned that "a comprehensive, discriminating, and continuing state surveillance will . . . involve excessive and enduring entanglement between state and church." Lemon v. Kurtzman, 403 U.S. at 619; Aguilar v. Felton, 53 U.S.L.W. 5013 (1985).

authority." 403 U.S. at 615.[8] These criteria require us to decline examination of the Seventh-day Adventist Church's decision here.

Appellant seeks to bring within the purview of Title VII the church itself, the institution with which the danger of entanglement is most sensitive. If the dangers of entanglement were severe with respect to parochial schools, Aguilar v. Felton, 53 U.S.L.W. 5013 (1985); Lemon, supra, they are all the more serious with respect to the church itself. While schools may serve both secular and sectarian functions, the purpose of the

[8] We recognize that the Court has recently indicated that the Lemon test is not necessarily the only appropriate means for deciding an establishment question. Lynch v. Donnelly, ____ U.S. ____, 104 S.Ct. 1355, 1362 (1984). Nevertheless, the framework of that case seems well suited to questions which involve the relationship of government to religious institutions.

church is fundamentally spiritual, and the danger of "interaction between church and state," Lynch v. Donnelly, ____ U.S. ____, 104 S.Ct. 1355, 1364 (1984), is what the establishment clause protects against.

The application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state both on a substantive and procedural level. On a substantive level, the unrefuted evidence from appellee Potomac Conference emphasized the importance of "spirituality" as an attribute of an associate in pastoral care and stated that in making an appointment, "The guidance of the Holy Spirit is always sought so that the one chosen can be God's appointed, as well as the one who has the support of his/her fellow churchmembers." It is axiomatic

that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of "God's appointed."

Moreover, the goals of a church in the selection of its spiritual leaders and of a governmental agency in the performance of its statutory mandate may not be the same. The Equal Employment Opportunity Commission may or may not share the values of any given church, whose highest priority is simply one of fidelity to its own beliefs and practices. The danger is that choices of clergy which conform to the preferences of public agencies may be favored over those which are neutral or opposed. The church's selection may at times result from preferences wholly impermissible in the

secular sphere.[9] Where goals differ, the temptation for state intrusion becomes apparent. But "[e]ven if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal." Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Columbia L. Rev. 1373, 1399 (1981). Where the values of state and church clash or where there is a differing emphasis among priorities or as to means in an employment decision of a theological nature, the church is entitled to pursue its own path without concession to the views of a federal agency or commission. Bureaucratic suggestion in employment

[9] For example, some churches, like the Seventh-day Adventist, do not permit the ordination of women.

decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority and compromise the premise "that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere." McCollum v. Board of Education, 333 U.S. 203, 212 (1948).

On a procedural level, entanglement might also result from a protracted legal process pitting church and state as adversaries in disregard of NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979). "[Pervasive monitoring by public authorities . . . infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." Aguilar v. Felton, 53

U.S.L.W. at 5016. A Title VII action is potentially a lengthy proceeding, involving state agencies and commissions, the EEOC, the federal trial courts and courts of appeal. Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers. The remedies that a district court may impose, 42 U.S.C. § 2000e-5(g) (1982), may be far-reaching in their impact upon religious organizations. Even after entry of judgment, questions of compliance may result in continued court surveillance of the church's policies and decisions. In Catholic Bishop, the Supreme Court, holding that church-operated schools were not subject to NLRB jurisdiction, noted that "It is not only the conclusions that may

be reached by the Board which may infringe on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502. The same is true here. There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.

Of course churches are not - and should not be - above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions.

See, e.g., EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981) (Title VII could be applied to promotion of secular teacher in religious educational institution); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982) (Title VII applicable to administrative and support staff at a seminary); EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982) (editorial secretary at church-affiliated publishing house); Whitney v. Greater New York Corporation of Seventh-day Adventists, 401 F.Supp. 1363 (S.D.N.Y. 1975) (typist-receptionist). Without adopting or rejecting the specific rulings of such cases, we hold that the Constitution requires that civil authorities decline to review either the procedures for

selection or the qualifications of those chosen or rejected here.

The decision of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CAROLE A. RAYBURN :

PLAINTIFF :

VS :

GENERAL CONFERENCE
OF SEVENTH-DAY :
ADVENTISTS, et al.

DEFENDANTS :

- -

CIVIL DOCKET B-82-2202

Baltimore, Maryland

February 3, 1984

The above entitled matter came on for a summary judgment motion hearing in the United States District Court before the Honorable Walter E. Black, Jr., beginning at 10 o'clock a.m.

APPEARANCES

FOR THE PLAINTIFF:

Eileen M. Stein, Esquire

FOR THE DEFENDANTS:

Walter E. Carson, Esquire
Glenn E. Culpepper, Esquire

Reported by:-
E. Edward Richardson
Official Court Reporter
United States District Court
583 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201
539-0034

ORAL OPINION

THE COURT: Counsel, I will render an oral opinion in this matter this morning, reserving the right if it's transcribed for any reason to edit that opinion as to grammar or style, references to the record or citations, without in anyway changing the result or the essential meaning of the opinion.

The plaintiff, Carole Rayburn, has filed this Title VII suit against the defendants, various Seventh Day Adventist individuals and organizations, alleging discrimination on the basis of sex, race, and opposition to practices unlawful under Title VII. The parties have already

stipulated to the dismissal of two of the original defendants in this action, General Conference Corporation of Seventh Day Adventists and Potomac Conference Corporation of Seventh Day Adventists. The remaining defendants filed motions to dismiss which were converted into motions for summary judgment pursuant to Federal Rules of Civil Procedure. The parties have fully briefed these motions, and the Court has had the benefit of oral argument here today. For other reasons set forth below, the motions for summary judgment are granted.

The following facts are not in dispute by the parties. The Seventh Day Adventist Church is a worldwide, Protestant religious body having approximately four million members. The total membership is divided into thirteen divisions, eighty-three unions and three hundred

seventy-eight conferences, missions and fields. The General Conference of Seventh Day Adventists, a non-profit unincorporated religious organization, conducts the spiritual and religious activities of the entire church at its offices in Washington, D. C.

The Sligo Seventh Day Adventist Church, located at the denomination's world headquarters in Takoma Park, Maryland, is a local church within the Potomac Conference, which is run by the Potomac Conference of Seventh Day Adventists, an unincorporated association. Defendant Kenneth Mitleider [sic] was president of the Potomac Conference prior to June 1, 1980. Defendant James Londis is Senior Pastor of Sligo Seventh Day Adventist Church.

The plaintiff alleges that in or about October, 1979, she filed applica-

tions for the position of Associate Pastor of the Sligo Church and for an Associate in Pastoral Care Internship position with the Potomac Conference. She claims that her applications were denied because she was female, she associated with black persons and was a member of black-oriented religious organizations, and she opposed practices made unlawful by Title VII.

The plaintiff filed a charge of discrimination with the EEOC on January 14, 1981, and received a right to sue letter on August 4, 1981, when the EEOC failed to take any action. The present action was filed on September 1, 1981.

Finally, the parties agree that the position of Associate Pastor at Sligo Church may be held by an ordained minister, a ministerial intern, or an Associate in Pastoral Care. It is undisputed

that while the positions which the plaintiff sought are open to women under the policies of the Seventh Day Adventist Church, women are barred from ordination as ministers in that church.

The Court will first consider the motion for summary judgment filed by defendants Potomac Conference, Kenneth Mittleider and James Londis. These defendants suggest six separate grounds in support of their motion, which the Court will consider in order.

The defendants first argue that the plaintiff has failed to satisfy the jurisdictional prerequisites of Title VII because her EEOC charge was filed more than one hundred eighty days after the alleged employment practice occurred. The Court will not address at this time the issue of whether the one hundred eighty day or three hundred day period

applies here, because there are questions of fact here which make summary judgment inappropriate on that issue.

The running of the time periods under 42 U.S.C. 2000e - 5(e) are tolled until facts indicating discrimination are known to the plaintiff.

There is a factual dispute here concerning when the plaintiff knew about the selection of others chosen for the positions in question, and when the plaintiff's application was actually rejected. The plaintiff claims she did not learn of Daffern's selection, that's the person who was selected in her place, her selection until June, 1980, and learned of McGraw's and Neely's selection, and they were selected for the other positions, in December, 1980.

She also claims her application was not rejected until the Executive Com-

mittee of the Potomac Conference met on November 19, 1980.

The plaintiff's EEOC charge was filed on January 8, 1981. Since factual questions exist on this issue, further consideration of these time limits is not appropriate at this point.

The defendants next argue that Mittleider and Londis should be dismissed from the suit because the plaintiff failed to name them as employers in her EEOC charge, even though both were named in the body of the charge. The recent Fourth Circuit opinion in Dickey v. Greene, 710 F. 2d 1003 (1983) is squarely on point and supports the defendants' position.

Since the Fourth Circuit has recently reconsidered Dickey en banc, however, the Court feels it would be more appropriate to await the Fourth Circuit's

further thoughts on this issue rather than dismiss any part of this suit on that ground.

The defendants' third ground for dismissal is that the plaintiff's complaint alleges discrimination for reasons not contained in the EEOC charge. The intake questionnaire filled out by the plaintiff lists race and sex as reasons for discrimination. The actual charge filed with the EEOC alleges discrimination based on sex and age; the charge also alleges that blacks and women are generally discriminated against as a class. The plaintiff's complaint gives plaintiff's sex, association with black persons, and opposition to policies unlawful under Title VII as reasons for the defendants' actions.

The relevant standard here, as articulated by the Fifth Circuit in

Sanchez v. Standard Brands, Inc., 431 F. 2d 455, 466 (5th Cir. 1970), is that "the scope" of the judicial complaint is limited to the "scope" of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.

This case presents a curious situation, since no EEOC investigation was ever conducted. Nevertheless, the Court finds that the allegations in the complaint could be expected to grow out of the plaintiff's charge, if an investigation had been conducted. The intake questionaire [sic], which the plaintiff filled out, did list her association with blacks as a reason for discrimination, and the charge mentioned discrimination against blacks in general.

In addition, the blanks which the plaintiff filled out on the charge asked

for "cause of discrimination based on my" race, color, sex, etc. There is no box for association with blacks.

And EEOC would probably have considered the plaintiff's association with black persons. It would be appropriate accordingly to deny summary judgment on this ground.

The defendants next argue that Mittleider and Londis are not employers within the meaning of 42 United States Code 2000e - (b). However, as the plaintiff points out, 2000e - (b) covers both the actual employer and any agent of the employer. The question of whether the two individual defendants were agents of the Potomac Conference involves factual questions and is therefore not ripe for resolution at this time.

The next issue raised by the defendants is whether Congress, in enacting

2000 e - 1, specifically exempted religious organizations from Title VII suits for discrimination on the basis of race, or sex.

The Courts which have considered this question agree that the legislative history and language of 2000 e - 1 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discrimination on the basis of sex or race. And the Court would cite McClure v. Salvation Army, 460 F. 2d 553 (5th Cir.), cert. den., 409 U.S. 896 (1972); EEOC v. Pacific Press Publishing Association, 676 F. 2d 1272 (9th Cir., 1982). This Court adopts the analyses in these cases and denies summary judgment on this ground.

This brings the Court to the final and most serious ground offered for summary judgment: Whether the religion

clauses of the First Amendment preclude the application of Title VII to the facts of this case. The religion clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The Supreme Court, in Lemon v. Kurtzman, 403 U.S. 602, at 612 to 613 (1971), set forth the criteria for determining whether a congressional enactment violates the establishment clause: "(1) whether the statute has a secular legislative purpose, (2) whether the principal effect of the statute is neither to advance nor inhibit religion, and (3) whether the statute fosters an excessive Government entanglement with religion." The inquiry under the free exercise clause involves an examination of "(1) the magnitude of the statute's

impact upon the exercise of the religious belief, (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state." And the Court would cite here EEOC v. Mississippi College, 626 F. 2d 477 (5th Cir. 1980), cert. den., 453 U.S. 912 (1981), that opinion citing Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963).

Title VII also has constitutional underpinnings. As the Court pointed out in EEOC v. Pacific Press, Title VII was based on Section 5 of the Fourteenth Amendment, in addition to the commerce clause. The question before the Court is whether and to what extent Title VII

applies to the decisions of religious organizations such as the Seventh Day Adventists.

The primary authorities in this area are a group of cases decided by the Fifth Circuit which carved out a "ministerial exception" to the application of Title VII to religious organizations, starting with McClure v. Salvation Army, 460 F. 2d 553 (5th Cir. 1972). McClure, citing a string of Supreme Court cases, found that freedom of religion included freedom of churches to decide for themselves, free from state interference, matters of church Government as well as matters of faith and doctrine.

The Court in McClure concluded that the church-minister relationship was at the heart of church administration and Government, and therefore should be free from any secular interference, including

Title VII.

Later on, the Fifth Circuit held that the minister exception does not apply to the employment relationship between a religious college and its faculty and staff, in EEOC v. Mississippi College, but the exception did apply to the faculty of a seminary but did not apply to the sports staff in EEOC vs. Southwestern Baptist Theological Seminary, 651 F. 2d 277 (5th Cir. 1981).

The Court adopts the rationale of these cases, and the relevant question therefore is whether the positions which the plaintiff sought were "ministerial".

The Court finds that these positions are ministerial in nature. There seems to be no real dispute that persons in these positions coordinate and plan services, counsel, preach, and hold classes.

The plaintiff argues that any lay

person in the Seventh Day Adventist Church is expected to perform these functions. The fact remains, however, that these tasks define what an Associate Pastor or an Associate in Pastoral Care does. Presumably, their special training allows them to do these tasks with greater skill and knowledge than possessed by a lay person. In any case, the tasks are similar to those performed by ordained ministers, other than those tasks which only ordained ministers can perform.

This is not a case, therefore, in which the jobs in question are quasi-secular in nature, such as publishing and teaching. Rather, the associate positions perform functions which go to the root of the church's religious mission.

The Court believes that a Title VII suit involving these ministerial positions would interfere with religious

beliefs and doctrines which are at the heart of the Seventh Day Adventist Church.

A Title VII suit would inevitably raise questions concerning whether the plaintiff is more qualified than other applicants for the associate positions, and whether the church was in fact motivated by religious reasons, and the Court, if the plaintiff prevailed, would, in effect, be forcing the church to accept the plaintiff in a ministerial position.

It is not for the Courts to determine who should be ministers in the Seventh Day Adventist Church; this would clearly run afoul of the religion clauses of the First Amendment. The specter of a class action, a discriminatory impact suit, is even more ominous.

The remedies which are integral to

Title VII simply cannot be harmonized with the need for religious groups to choose those who will lead them in worship as they see fit.

Since there is no genuine dispute over the functions which the Associate Pastor and Associate in Pastoral Care positions involve, and since these positions clearly fall within the ministerial exception to the application of Title VII, the Court deems summary judgment as appropriate on this ground.

Finally, the Court will consider the motion for summary judgment filed by the General Conference. The Court has already discussed the relationship between Title VII and the First Amendment, it is not necessary to repeat that discussion now.

The other principal ground advanced by the General Conference is that they

had no involvement with the plaintiff's application. The Court finds that this argument is an appropriate ground for summary judgment as well.

The plaintiff has been unable to produce any evidence whatsoever to indicate that the General Conference, a body having worldwide responsibilities, had any part in the decision to reject her applications.

Even if the Court accepts as true the plaintiff's contentions that the General Conference must approve any candidates recommended by the Potomac Conference and that the General Conference played a role in hiring the applicants who were chosen instead of the plaintiff, there is no indication that the General Conference even considered or acted upon the plaintiff's application.

The general conclusion in the plain-

tiff's affidavit that she had "contact with the General Conference on several occasions regarding my application and rejection for employment," is conclusory and does not raise a genuine issue of material fact.

Neither does the Londis deposition aid the plaintiff in avoiding summary judgment. Since there is no genuine question of material fact concerning the General Conference's role in rejecting the plaintiff's application, the General Conference's motion for summary judgment will be granted on that ground as well as the constitutional ground.

For the reasons set forth above, the General Conference's motion for summary judgment is granted, and the motion of defendants Potomac Conference, Mittleider and Londis for summary judgment is granted and I will issue a formal order

in accordance with this oral opinion.

Thank you all very much.

MR. CULPEPPER: Thank you, Your Honor.

MISS STEIN: Thank you, Your Honor.

THE BAILIFF: Please rise. This Honorable Court now stands recessed.

(Thereupon Court stood adjourned at 11:45 o'clock a.m.)

* * * * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CAROLE A. RAYBURN	:	
v.	:	
GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, an unincorporated association : POTOMAC CONFERENCE OF SEVENTH-DAY ADVENTISTS, an unincorporated association, KENNETH J. MITTLEIDER, and JAMES LONDIS	:	CIVIL ACTION NO. B-81-2202

ORDER AND JUDGMENT

Presently pending in the captioned case are the following: (1) Motion to Dismiss, filed on behalf of defendants, General Conference of Seventh-Day Adventists and General Conference Corporation of Seventh-Day Adventists (Paper 8),and (2) Motion to Dismiss Complaint for Injunctive Relief, filed on behalf of defendants, Potomac Conference of

Seventh-day Adventists, Potomac Conference Corporation of Seventh-day Adventists, Kenneth J. Mittleider and James Londis (Paper 9). By Stipulations of Dismissal (Papers 20 and 21), approved by the Court on January 14, 1982 and January 28, 1982, respectively, General Conference Corporation of Seventh-day Adventists and Potomac Conference Corporation of Seventh-day Adventists were dismissed as parties to this litigation. After careful review of the memoranda filed on behalf of all of the parties and oral argument presented by counsel for the parties at a hearing herein on February 3, 1984; in accordance with the Court's oral opinion rendered at the conclusion of said hearing, IT IS, this 15th day of February, 1984, ORDERED and ADJUDGED as follows:

1. That the Motion to Dismiss (Paper 8), pending on behalf of the remaining movant, General Conference of Seventh-day Adventists--being treated as a motion for summary judgment--BE and the same hereby IS, GRANTED.

2. That the Motion to Dismiss Complaint for Injunctive Relief (Paper 9), pending on behalf of the remaining movants, Potomac Conference of Seventh-day Adventists. Kenneth J. Mittleider, and James Londis--being treated as a motion for summary judgment--BE and the same hereby IS, GRANTED.

3. That judgment BE and the same hereby IS, ENTERED in favor of defendants, General Conference of Seventh-day Adventists, Potomac Conference of Seventh-day Adventists, Kenneth J. Mittleider, and James Londis, against plaintiff, Carole A. Rayburn, each side

to bear its own costs.

4. That the Clerk shall mail copies of this Order and Judgment to counsel of record for the parties to this action.

/s/ Walter E. Black, Jr.
Walter E. Black, Jr.
United States District Judge

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 84-1319

Carole A. Rayburn, Appellant,

v.

General Conference of Seventh-Day Adventists, an unincorporated association; General Conference Corporation of Seventh-Day Adventists, a corporation; Potomac Conference of Seventh-Day Adventists, an unincorporated association; Potomac Conference Corporation of Seventh-Day Adventists, a co[r]poration; Kenneth J. Mittleider, and James Londis;

Appellees.

Appeal from the United States District Court for the District of Maryland

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District court appealed from, in this cause, be, and the same is hereby,

Affirmed.

CLERK

F I L E D

SEP 23 1985

U. S. Court of Appeals

Fourth Circuit

APPENDIX E

42 U.S.C.S. § 2000e, e-1, e-2

EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions

For the purposes of this title [42 USCS §§ 2000 et seq.]--

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or

preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code [5 USCS § 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 USCS § 501(c)], except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is

subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], or (B) fifteen or more thereafter, and such labor organization--

(1) is the certified representative of employees under the provisions of

the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) has the local or subordinate body

through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy

making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce

or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's

business.

§ 2000e-1. Exemption

This title [42 USCS §§ 2000e et seq.] shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

§ 2000e-2. Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify

or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization. It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as

an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Religion, sex, or national origin as bona fide occupational qualification;

educational institutions with employees of particular religions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer to employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or re-training programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal

operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organization. As used in this title [42

USCS §§ 2000e et seq.], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individ-

ual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; ability

tests. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to dis-

criminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)) [28 USCS § 206(d)].

(i) Preferential treatment to Indians living on or near reservation. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a

preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not required on account of numerical or percentage imbalance. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment

agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

APPENDIX F

POTOMAC CONFERENCE OF SEVENTH-DAY ADVENTISTS P. O. Box 1208 Staunton, Virginia 24401 Telephone 703-836-0771

October 23, 1979

TO: Kenneth J. Mittleider
John Loor

FROM: Daniel G. Matthews

RE: Carole A. Rayburn Letter

Here is a letter from Carole Rayburn which is a follow-up to a telephone visit with her a couple of weeks ago. She apparently drew a conclusion about an associate in pastoral care internship from the observation I made that we would be looking for interns this year. At any rate, here is her letter. I have a copy

of her resume, which is nine pages long and very impressive. I thought if you wanted to read it we could share the same copy and avoid duplication.

In addition, I am sending you a copy of a letter from Steve Vitrano, who seems to be recommending Ms. Rayburn for an associate in pastoral care internship.

Are there any possibilities here or should we be telling her "nix" again right from the top? I did encourage her to send her resume to other conferences, but she seems to have the greatest burden to work in Potomac. Apparently, also, Elder Bradford has encouraged her.

blm

Enclosures

APPENDIX G

October 30, 1979

TO: Dan Matthews

FROM: Ken Mittleider

RE: Carole A. Rayburn's Letters

Dan, regarding Carole Rayburn, I wish you would talk with Alan Anderson. He said very little me, but he is coming from the same spot as I am. I wonder if the fellows who are making the recommendations really know her. She is a crusader. You will notice one of the activities she joined in at Andrews is the Black Forum. She will constantly be working from "the underprivileged", trying to better their situation from a material standpoint.

She could not get a recommendation from Lenard Jaecks to attend Andrews, and that was why I quizzed her as to why she desired to attend. Only after she assured me she wanted to do it in line with her work and for personal edification did I write a recommendation. I think Carole's letter to me on October 20, 1979 substantiates what I said about Lenard not giving her a recommendation. There seems to be a clear ringing of attitudes of what I would fear most as to her effectiveness in a role as associate in pastoral care. I would surely hope that she would work in the area of clinical psychology.

You know I don't close any doors permanently, so if you have any other questions, let's discuss them in person.

bjm

CERTIFICATE OF SERVICE

The foregoing Petition for a Writ of Certiorari was served this 20th day of December, 1985, by mailing three copies to each of the following:

Glenn E. Culpepper, Esq.
Gingerich & Culpepper
7000 Carroll Avenue
Takoma Park, Maryland 20912
Attorney for Defendants
Mittleider, Londis, and
Potomac Conference Corporation
of Seventh-Day Adventists

Walter E. Carson, Esq.
Johns & Carson
6930 Carroll Avenue, Suite 629
Washington, D. C. 20012
Attorney for Defendant
General Conference of
Seventh-Day Adventists

The Solicitor General
United States Department of Justice
Washington, D. C. 20530

William E. Nelson
William E. Nelson

Supreme Court, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL
CLERK

No. 85-1071

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CAROLE A. RAYBURN, *Petitioner,*

v.

GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, *et al.*, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WALTER E. CARSON
JOHNS AND CARSON
Suite 629 - North Building
6840 Eastern Avenue, N.W.
Washington, D.C. 20012
202/722-6320

GLENN E. CULPEPPER
GINGERICH AND CULPEPPER
7000 Carroll Avenue
Takoma Park, MD 20912
301/270-2434

Attorneys for Respondents

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondents believe that the Questions Presented in the Petition for a Writ of Certiorari do not adequately state the issues of this case. Respondents submit that the following questions more accurately state the issues before this Court.

I. Was the court of appeals correct in holding that although Title VII of the Civil Rights Act of 1964 applied to the employment decision in a case brought by a woman denied a ministerial position in a church, suit was barred by the Religion Clauses of the First Amendment because governmental scrutiny would infringe substantially on the Church's free exercise of religion and would constitute an impermissible government entanglement with church authority?

II. Is there a conflict among the circuit courts on the issues presented in this Petition?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT	4
I. THE RELIGION CLAUSES OF THE FIRST AMENDMENT PROTECT CHURCHES FROM GOVERNMENTAL INTERFERENCE WITH THE CHURCH'S CENTRAL SPIRITUAL FUNCTIONS	4
A. Free Exercise Clause	5
B. Establishment Clause	12
II. THIS IS NOT A FREQUENTLY RECURRING ISSUE NOR IS IT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS	16
CONCLUSION.....	18

TABLE OF AUTHORITIES

Page

Aguilar v. Felton, 105 S.Ct. 3232 (1985) 12

Catholic Bishop of Chicago v. *NLRB*, 559 F.2d 1112 (1977), *aff'd on other grounds*, 440 U.S. 490 (1979) . 10

Dayton Christian Schools v. *Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985), *review granted*, 54 U.S.L.W. 3323 (Nov. 12, 1985)..... 11, 17

Dolter v. *Wahlert High School*, 483 F.Supp. 266 (N.D. Iowa 1980) 17

EEOC v. *Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982) 17

EEOC v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) 16

Gonzalez v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929)..... 7

Kedroff v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). 5, 7, 9

Lemon v. *Kurtzman*, 403 U.S. 602 (1971)..... 5, 15

McClure v. *Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972)..... 9, 10, 16

McCollum v. *Board of Education*, 333 U.S. 203 (1948) . 14

NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979)..... 10, 14

Rayburn v. *General Conference of Seventh-day Adventists*, 772 F.2d 1164 (1985)..... 3

Regents of the University of Michigan v. *Ewing*, 54 U.S.L.W. 4055 (1985) 5

Serbian Eastern Orthodox Diocese v. *Milivojevich*, 426 U.S. 696 (1976)..... 7, 8

Simpson v. *Wells Lamont Corporation*, 494 F.2d 490 (5th Cir. 1974) 17

Tony and Susan Alamo Foundation v. *Secretary of Labor*, 105 S.Ct. 1953 (1985)..... 6

Whitney v. *Greater New York Corporation of Seventh-day Adventists*, 401 F.Supp 1363 (S.D. N.Y. 1975) 17

Wisconsin v. *Yoder*, 406 U.S. 205 (1972)..... 6

CONSTITUTION:

U.S. Const. amend. I..... *passim*

Table of Authorities Continued

Page

STATUTES:

42 U.S.C.A. § 2000e-5(g) (1982) 14

MISCELLANEOUS:

Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L.Rev. 1373 (1981) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1071

CAROLE A. RAYBURN, *Petitioner,*

v.

GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, *et al.*, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COUNTERSTATEMENT OF THE CASE

This case involves a dispute between the Seventh-day Adventist Church and Carole A. Rayburn, one if its female members, over the Church's failure to hire her for a ministerial position.

Rayburn applied to the Potomac Conference for an associate in pastoral care internship. She also applied for a vacancy on the pastoral staff of Sligo Church. Both the Sligo vacancy and the internship position were awarded to another woman. Rayburn filed a complaint with the Equal Employment Opportunity Commission alleging discrimi-

nation on the basis of her sex and racial association.[1] After receiving a right-to-sue letter, she filed the present action against Respondents.

The issue before the district court was whether a woman denied a pastoral position in the Seventh-day Adventist Church may charge that church with sexual and racial discrimination under Title VII of the Civil Rights Act. In granting Respondents' motions for summary judgment, Judge Black of the district court concluded that: "[T]hese positions are ministerial in nature. . . .[T]he tasks are similar to those performed by ordained ministers. . . . [T]he associate positions perform functions which go to the root of the Church's religious mission." Petitioner's Appendix (Pet. App.) 52-A, 53-A. He ruled that a Title VII suit was barred in this instance by the Religion Clauses of the First Amendment. Contending that the selection of an associate in pastoral care is not exempt from Title VII scrutiny, Rayburn appealed to the Fourth Circuit Court of Appeals.

In affirming the lower court's decision, Judge Wilkinson, speaking for a unanimous appellate court, found the evidence "simply overwhelming" that the positions sought by Rayburn were important to the spiritual and pastoral mission of the Church. Pet. App. 22-A. The court, concluding that the positions which Rayburn sought "entailed teaching baptismal and Bible classes, pastoring the singles group, occasional preaching at Sligo

---

[1] While the Church does not condone racial or sexual discrimination, it does not presently ordain women as ministers. While Rayburn was not hired, the vacancy that she applied for was awarded to another woman. Further, a significant portion of the Church's membership is black. There are many black clergymen and leaders in the Church as well. The Church teaches that racial and sexual discrimination is abhorrent.

and other churches, and other evangelical, liturgical, and counseling responsibilities," observed that:

> The associate in pastoral care at Sligo Church is, according to undisputed evidence, pastoral advisor to the Sabbath School that introduces children to the life of the church. She also leads small congregational groups in Bible study. As counselor and as pastor to the singles group, the associate in pastoral care is once again a liaison between the church as an institution and those whom it would touch with its message.

Rayburn v. *General Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1168.

While acknowledging that Title VII applied to the employment decision in this case, the court of appeals held that suit was barred by the Religion Clauses of the First Amendment because governmental scrutiny "would infringe substantially on the Church's free exercise of religion and would constitute an impermissible government entanglement with Church authority. "It determined that any attempt to restrict the Church's choice of its spiritual leaders would constitute a burden on the Church's free exercise rights. Pet. App. 2-A, 17-A.

SUMMARY OF ARGUMENT

(1) The selection of a person to stand in the pulpit of a church is a decision absolutely protected by the Religion Clauses of the First Amendment.

(2) The Fourth Circuit decision followed applicable law and does not conflict with the decision of any other federal court of appeals; nor does the ruling decide a federal question in conflict with a state court of last resort.

ARGUMENT

Petitioner asserts that the decision of the court of appeals involves a frequently recurring issue, is in conflict with the decisions of other courts, and can only be resolved by this court. Pet. 19. While the specific issue raised by this case, the constitutionality of Title VII as it relates to the Seventh-day Adventist Church's selection of its ministers, has never been tested in this Court, the broad principal involved, the protection of the relationship between a church and its clergymen against governmental interference on First Amendment grounds, has been considered by this Court many times.

Where, as here, the issue was resolved by the district court and the court of appeals in a manner consistent with the applicable decisions of this Court and other circuit courts of appeals that have addressed this issue, there is no need for this Court to grant Certiorari.

I. The Religion Clauses Of The First Amendment Protect Churches From Governmental Interference With The Church's Central Spiritual Functions

Despite Petitioner's attempt to expand the holding of the court of appeals, the issue involved in this case is a narrow one: whether the provisions of Title VII may be applied to the employment relationship between a church and its ministers without violating the Religion Clauses of the First Amendment. Petitioner would ignore this issue, rather suggesting that the "critical question" to be resolved by this Court is whether or not First Amendment protections are available to a church absent a showing of some doctrinal basis for its alleged acts of discrimination.

Permitting the government to scrutinize the selection of clergymen would violate the Religion Clauses of the

First Amendment in two respects. First, it would interfere with the Church's right to select its own clergy in violation of the Free Exercise Clause. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). Secondly, it would lead to "excessive government entanglement" with religious institutions which is forbidden by the Establishment Clause. *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971). Since the purpose of a Church is fundamentally spiritual, evaluation of its employment practices in the selection of persons to fill ministerial positions would entail obvious constitutional problems under both of the Religion Clauses.

A. Free Exercise Clause

The Seventh-day Adventist Church has a substantial interest in autonomy in the selection of its clergy and hence must not be subject to those legal restraints applicable to secular or commercial institutions. *Cf. Regents of the University of Michigan* v. *Ewing*, 54 U.S.L.W. 4055, at 4058, N.12 (1985). *See also* Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L.Rev. 1373, 1389 (1981). The importance of the role of associate in pastoral care in the church-minister relationship was properly emphasized by the court of appeals:

> The role of associate in pastoral care is so significant in the expression and realization of Seventh-day Adventists beliefs that state intervention in the appointment process would excessively inhibit religious liberty. The associate in pastoral care at Sligo Church is according to undisputed evidence, pastoral advisor to the Sabbath School that introduces children to the life of the church. She also leads small congregational groups in Bible study. As coun-

> selor and as pastor to the singles group, the associate in pastoral care is once again a liaison between the church as an institution and those whom it would touch with its message. Such counseling requires sensitivity both to the human problems of the congregation and to the church's message of comfort in the face of those problems. Never are people more in need of spiritual leadership than when they turn to a pastor for help in dealing with their most difficult moments. Finally, the selection of the associate in pastoral care to stand on the platform during services, to lead out the congregation during the church's solemn rites, and to preach occasionally from the pulpit, places the imprimatur of the church upon that person as a worthy spiritual leader to whom members may look for consultation, example and guidance in their own lives and in the life of the congregation as a corporate body. Pet. App. 18-A, 20-A.

For the government to interfere with this selection process or decision constitutes a violation of the Church's right to the free exercise of this core religious act.

An inquiry under the Free Exercise Clause requires the following analysis: (1) Is the practice questioned religious in nature? *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-16 (1972). (2) Does the challenged action interfere with the religious practice? *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 105 S.Ct. 1953 (1985). (3) Is the government's policy justified by a compelling interest which cannot otherwise be indicated? *Wisconsin* v. *Yoder, supra*. As the facts of this case show, the selection of a minister is clearly a religious function; there is no compelling government interest which cannot otherwise be served by exempting such positions from Title VII.

The selection of a minister goes to the heart of a Church's free exercise rights under the First Amend-

ment. The courts have scrupulously followed this Court's recognition of the constitutional mandate to avoid involvement in church-minister relationships. *Gonzalez* v. *Archbishop of Manila*, 280 U.S. 1 (1929); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S 94 (1952).

In *Kedroff* v. *St. Nicholas Cathedral*, *supra*, this Court considered a case involving a state law which transferred administrative control of the Russian Orthodox churches in North America from the Patriarch of Moscow to authorities selected by a convention of Russian Orthodox churches in North American. This resulted in appointees of the Patriarch of Moscow being denied the use and occupancy of St. Nicholas Cathedral in New York City.

Holding the state law to be an unconstitutional interference with the free exercise of religion, this Court stated: "legislation that regulates church administration, the operation of the churches, the appointment of clergy . . prohibits the free exercise of religion," *Id.* at 107. There must exist, the Court observed, "a spirit of freedom for religious organizations, and independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine," *Id.* at 116.

In *Gonzalez* v. *Archbishop of Manila*, *supra*, the Petitioner attempted to challenge a refusal by the Archbishop of Manila to appoint him to a chaplaincy. This refusal was upheld by this Court which held that it is the function of church authorities to determine what the essential qualifications of a chaplain are and whether a candidate possesses them and that the decisions of the proper church tribunal on matters purely ecclesiastical, although

affecting civil rights, are to be accepted in litigation before the secular courts as conclusive.

In *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, *supra*, this Court found that a state court's "detailed review" of evidence challenging the removal and defrockment of a bishop by a hierarchal church whose religious bodies had sole discretion and authority to make such ecclesiastical decisions was impermissible under the First and Fourteenth Amendments. The state court's error was compounded by evaluating the evidence, delving into various church constitutional provisions and sanctioning circumvention of tribunals set up to resolve internal church disputes. In summary, the state court unconstitutionally undertook resolution of quintessentially religious controversies committed by the First Amendment exclusively to the highest ecclesiastical tribunals of the hierarchial church.

If the decision of the church's governing body must be accepted as final and binding on questions of actual participation in the ministry of the church; if courts may not decide who ought to be a member of a church, or whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church, then certainly the decision as to whether someone has been "justly or unjustly, regularly or irregularly" excluded from participation in a calling which is decidedly sacramental and sacerodotal is also beyond the purview of the courts and Congress.

In its decision, the court of appeals gave careful consideration to the applicable precedents of this Court. It recognized that these cases stand for the proposition that matters of church government and administration, including ecclesiastical rules, customs, laws and practices, as

well as those of faith and doctrine, are beyond civil authorities and that these are "matters at the very core of religion" and thus protected against governmental infringement by the First Amendment. Legislation which attempts to regulate matters of church government or the relationship between the church and its ministers is an unconstitutional intrusion of governmental power into "the forbidden area of religious freedom." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 at 107-08, 119.

At least three appellate court decisions have had occasion to consider the appropriateness of governmental intervention into employment decisions affecting sensitive positions within religious organizations. In *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972), a woman who had been an officer-minister with the Salvation Army charged that she had been paid less and provided with fewer fringe benefits than similarly situated males, and further, that she had been discharged in retaliation for complaints made to superiors and the Equal Employment Opportunity Commission. She initiated legal proceedings against her former employer under Title VII seeking reinstatement as an officer-minister. The Salvation Army moved to dismiss, contending that application of Title VII to a church-minister employment relationship would violate the Free Exercise Clause of the First Amendment.

The Fifth Circuit's opinion made the following observation:

> The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purposes. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a

> minister is a matter of church administration and government, so are the functions which accompany such a selection.

McClure v. *Salvation Army*, 460 F.2d at 559.

The court was concerned that the application of Title VII to the church-minister relationship would indeed violate the free exercise rights of this religious organization. It concluded that Congress, in enacting Title VII, did *not* intend to regulate the employment relationship between a church and its ministers. In this construction of Title VII, the court anticipated the Supreme Court's own conclusion in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

In *Catholic Bishop of Chicago* v. *NLRB*, 559 F.2d 1112 (1977), *aff'd on other grounds*, 440 U.S. 490 (1979), the Seventh Circuit expressed grave concern with the National Labor Relations Board exercising jurisdiction over Catholic parochial school teachers. Relying upon the "Religion Clauses" the court ruled that the Board did *not* have jurisdiction over such teachers:

> A church which chooses to educate its own young people in schools which it is required essentially to finance without governmental aid should because of the essentially religious permeation of its curriculum be equally freed of the obviously inhibiting effect and impact of the restrictions of the National Labor Relations Act in conducting the teaching program of those schools.

Catholic Bishop of Chicago v. *NLRB*, 559 F.2d 1112 at 1130. If the Catholic Church is protected from governmental interference in matters pertaining to its school teachers, certainly other churches, including the Seventh-day Adventist Church must be entitled to complete

freedom in the selection of those persons who will direct the spiritual lives of its congregation.

Recently, the Sixth Circuit has had occasion to address the application of the Ohio Civil Rights Act to the position of a church school teacher. In *Dayton Christian Schools* v. *Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985), *prob. juris. noted*, 54 U.S.L.W. 3323 (Nov. 12, 1985), found that the parochial school involved had "a dominant religious purpose which permeates both the administrative and substantive aspects of the school." *Id.* at 936.

The court ruled that the Ohio Civil Rights Commission—exercising powers not unlike the Equal Employment Opportunity Commission—did *not* have jurisdiction over a discharged teacher's employment discrimination charge. The school, owned and operated by a religious organization, had indicated it would not rehire the teacher because she was pregnant and school policy required such persons to remain at home with their preschool children. The teacher was subsequently discharged because she had filed a charge with the Commission thus failing to follow the Biblical chain of command by taking the school to law.

The Court found the exercise of jurisdiction by the Commission over church school teachers to be "extremely burdensome on appellants' exercise of religion." It found coercive state action and observed:

> [W]hen the state penalizes particular hiring practices with respect to an individual employed to provide religious instruction and act as a religious role model when the employment is governed by religious principles, a burden on religion exists.

Dayton Christian Schools, 766 F.2d at 950.

Thus, the Supreme Court and various appellate courts have recognized the grave free exercise problems which arise whenever efforts are made to interfere with employment practices of religious organizations. The Seventh-day Adventist Church maintains that of all positions in a religious organization, the highest in a spiritual sense and most certainly protected by the Free Exercise Clause is that of the minister. There exists no valid reason or interest for the church's decisions pertaining to this position to be questioned under civil law.

B. Establishment Clause

The intrusion of the federal government and the civil courts into the selection of church leaders also raises legitimate concerns under the Establishment Clause of the First Amendment. The court of appeals correctly reasoned that if the dangers of entanglement are acknowledged by this Court to be severe with respect to church related organizations, such as parochial schools, *Aguilar* v. *Felton*, 105 S.Ct. 3232 (1985), they are all the more dangerous with respect to churches themselves. While schools serve both secular and sectarian functions, the purpose of a church is fundamentally spiritual and interaction between churches and the state is precisely what the Establishment Clause protects against.

The purpose of a church is spiritual. Thus, evaluation of its employment practices entail obvious constitutional problems. Application of Title VII to employment decisions such as the one in this case, would result in an impermissibly close relationship between church and state on both substantive and procedural levels.

Focusing on the substantive level, the court of appeals stated:

> [T]he unrefuted evidence from appellee Potomac Conference emphasized the importance of "spirituality" as an attribute of an associate in pastoral care and stated that in making an appointment, "The guidance of the Holy Spirit is always sought so that the one chosen can be God's appointed, as well as the one who has the support of his/her fellow churchmembers." *It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of "God's appointed."* [Emphasis added.]

Pet. App. 29-A, 30-A.

In addition, the court recognized that the goals of the Church in selecting its ministers and the governmental agency in performing its statutory obligation may not be the same. The EEOC might not share the Church's values. There exists a danger that the choices of clergy which conform to public agency preferences might be favored over those which were neutral. The court recognized that at times the preferences of a church might be impermissible in the secular sphere. Noting that the temptation for state intrusion becomes apparent where goals differ, the court stated:

> But "[e]ven if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal." Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Columbia L.Rev. 1373, 1399 (1981). Where the values of state and church clash or where there is a differing emphasis among priorities or as to means in an employment decision of a theological nature, the church is entitled to pursue its own path without concession to the views of a federal agency or commission. Bureaucratic suggestion in employment

> decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority and compromise the premise "that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere." *McCollum* v. *Board of Education*, 333 U.S. 203, 212 (1948).

Pet. App. 31-A, 32-A.

On the procedural level, the court recognized that the church and state might be pitted against each other in protracted legal battles resulting in entanglement disregarding this Court's warning in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490. Pervasive monitoring by public authorities infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. The court stated:

> A Title VII action is potentially a lengthy proceeding, involving state agencies and commission, the EEOC, the federal trial courts and courts of appeal. Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers. The remedies that a district court may impose, 42 U.S.C. § 2000e-5(g) (1982), may be far-reaching in their impact upon religious organizations. Even after entry of judgment, questions of compliance may result in continued court surveillance of the church's policies and decisions.

Pet. App. 33-A.

As this Court observed in *NLRB* v. *Catholic Bishop of Chicago*, *supra*, "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religious Clauses, but also the very

process of inquiry leading to findings and conclusions," 440 U.S. at 502. The court of appeals expressed the same concerns here: "There is the danger that churches, wary of EEOC judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal doctrinal assessments of who would best serve the pastoral needs of their members."

Pet. App. 34-A.

To subject the selection of ministers to scrutiny under Title VII would give rise to "excessive government entanglement" with religious institutions in violation of the Establishment Clause of the First Amendment, *Lemon* v. *Kurtzman*, 403 U.S. at 613. Under *Lemon*, entanglement is measured by the "character and purposes of the institutions that are benefited, the nature of the aid . . . and the resulting relationship between the government and the religious authority," 403 U.S. at 615. Any evaluation under this criteria requires a church to be exempt in the selection of its ministers from the type of governmental scrutiny which would result under Title VII.

The Church does not claim to be above the law. But in the selection of clergy, it is improper, impractical and unconstitutional to apply Title VII to this process. Petitioner argues that Seventh-day Adventist doctrine is consistent with the objectives of Title VII with respect to discrimination based on sex, race and association and would therefore invoke the aid of the federal courts to enforce her interpretation of Seventh-day Adventist doctrine in this regard. It is important to note that Title VII covers complex matters of discrimination including failure or refusal to hire, discharge, compensation and the

"terms, conditions and privileges of employment." Can the federal government, through the EEOC or otherwise, ever dictate the terms of a minister's calling? Is the EEOC going to be permitted to investigate an associate in pastoral care's hours, place of assignment, type of activity assigned, or the number of hardships she must undergo in order to fulfill her religious mission? If unrestrained by the First Amendment, Title VII would reach so deeply into the intimate relationship of the Church and its ministers that it would seriously disrupt and interfere with the most basic function of a minister: spreading of the gospel. If the Church's doctrine requires that males and females of all races be treated equally, the Seventh-day Adventist Church is certainly to be commended. If its doctrine in these respects seems to be consistent with the objectives of Title VII of the Civil Rights Act, all the better. However, the Establishment Clause prohibits the courts or Congress through the EEOC or otherwise, from venturing into this constitutionally protected area for the purpose of attempting to determining whether the Seventh-day Adventist Church or any other church is, in fact, adhering to its doctrines, tenets or practices with respect to its clergy.

II. This Is Not A Frequently Recurring Issue Nor Is It In Conflict With The Decisions Of Other Courts

This decision is one of first impression insofar as it declares Title VII unconstitutional when applied to the church-minister employment relation. The principle of exempting ministerial positions from the Act has, however, been embraced in a line of Fifth Circuit cases beginning with *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). *See also EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905

(1982); *Cf. Simpson* v. *Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974); and *Dayton Christian Schools, Inc.* v. *Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985), *review granted*, 54 U.S.L.W. 3323 (Nov. 12, 1985).

The decision before this Court is not in conflict with any other federal appellate court decision known to the Respondents. The cases referred to in Rayburn's Petition are clearly distinguishable on their facts. For example, *EEOC* v. *Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982), applied Title VII to an editorial secretary; *Whitney* v. *Greater New York Corporation of Seventh-day Adventists*, 401 F.Supp. 1363 (S.D. NY 1975), applied Title VII to a clerk typist position; *Dolter* v. *Wahlert High School*, 483 F.Supp. 266 (N.D. Iowa 1980), applied Title VII to a church school teacher who was discharged because she was pregnant. None of the cases involves the application of Title VII to the church-minister relationship. Thus, Petitioner's reliance on these cases is misplaced. Recognizing this distinction, the Fourth Circuit expressly refrained from adopting or rejecting the specific rulings of those cases involving the employment relationship between a church or church-related organization and its non-ministerial employees which the Petitioner has cited.

The Petitioner does not refer to, nor are Respondents familiar with any state court decisions confronting this issue.

CONCLUSION

Who is to stand in the pulpit represents a uniquely ecclesiastical decision over which neither the government nor the civil courts may exercise any power. For the reasons stated herein, the decision of the Court of Appeals for the Fourth Circuit finding Title VII unconstitutional as applied to the selection of clergy by the Seventh-day Adventist Church is clearly correct and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WALTER E. CARSON, ESQ.
JOHNS AND CARSON
Suite 629 - North Building
6840 Eastern Avenue, N.W.
Washington, D.C. 20012
202/722-6320

GLENN E. CULPEPPER, ESQ.
GINGERICH AND CULPEPPER
7000 Carroll Avenue
Takoma Park, MD 20912
301/270-2434

Attorneys for Respondents